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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/497,620	02/03/2000	Douglas E. Ott	15006.0007U2	7719

7590 05/18/2005  
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EXAMINER

THOMPSON, MICHAEL M

ART UNIT PAPER NUMBER

3763

DATE MAILED: 05/18/2005

Please find below and/or attached an Office communication concerning this application or proceeding.

## Office Action Summary

Application No.

09/497,620

Applicant(s)

OTT ET AL.

Examiner

Michael M. Thompson

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

### Status

- 1) ☒ Responsive to communication(s) filed on 18 February 2005.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

### Disposition of Claims

- 4) ☒ Claim(s) 32-44 and 53-61 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 32-44, 53-61 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
  - ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

### Attachment(s)

- |   |   |
|---|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892)   | 4) <input type="checkbox"/> Interview Summary (PTO-413)<br>Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)  | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152)             |
| 3) <input checked="" type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)<br>Paper No(s)/Mail Date <u>02/18/05</u> | 6) <input type="checkbox"/> Other: _____  |

## DETAILED ACTION

### *Claim Rejections - 35 USC § 103*

1. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

2. This application currently names joint inventors. In considering patentability of the claims under 35 U.S.C. 103(a), the examiner presumes that the subject matter of the various claims was commonly owned at the time any inventions covered therein were made absent any evidence to the contrary. Applicant is advised of the obligation under 37 CFR 1.56 to point out the inventor and invention dates of each claim that was not commonly owned at the time a later invention was made in order for the examiner to consider the applicability of 35 U.S.C. 103(c) and potential 35 U.S.C. 102(e), (f) or (g) prior art under 35 U.S.C. 103(a).

3. Claims 32-43 and 53-55 are rejected under 35 U.S.C. 103(a) as being unpatentable over Bartels et al. (U.S. 4,621,632) in view of Bell (6,039,696). Bartels et al. teaches a method of providing for a period of time, heated and humidified gas into a patient by directing a gas from a source to a chamber, humidifying the gas within the chamber with liquid, replenishing the liquid, heating the gas, filtering the gas, sensing the temperature, controlling the electrical power, wherein the step of heating and humidifying performed on the gas is simultaneous, with the chamber adjacent to the patient. Bartels teaches all of the limitations of the claims except for explicitly reciting a humidity sensing means and a monitoring means connected to the humidity sensing means for monitoring the humidity of the gas and keeping it within a determined

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threshold. Bell teaches a humidity sensing means and a monitoring means for monitoring the humidity of the gas and keeping it within a determined threshold. It would have been obvious to one of ordinary skill in the art, at the time of invention to have modified the humidity device of Bartels et al. to monitor humidity by a humidity sensing means as taught by Bell while keeping the humidity within a determined range or threshold for the well known purpose of preventing a cavity that is normally moist from drying out thereby causing inflammation causing discomfort such as the respiratory system or otherwise. Please note that the Examiner considers a recharge signal as being any signal generated by the humidity sensor to indicate the device is low on humidity.

4. Claim 44 is rejected under 35 U.S.C. 103(a) as being unpatentable over Bartels et al. and Bell as applied to claims 32-43 above, and further in view of Ott et al. (5,411,474). Bartels et al. and Bell teach all of the limitations of the claims except for filtering the gas prior to the step of humidifying. Ott et al. teaches that "It is known to filter insufflation gas" to prevent passing of inorganic molecules. He further states, "The location and type of filter, however, are very important factors which will influence the effectiveness of the method." It would have been obvious to one having ordinary skill in the art, at the time the invention was made, to have modified the insufflation device taught by the combination of Bartels et al. and Bell with the placement of a filter as taught by the insufflation device of Ott et al. for the purpose of preventing inorganic molecules from reaching the respiratory system.

5. Claims 32-44 and 53-55 are rejected under 35 U.S.C. 103(a) as being unpatentable over Ott et al. ('474) in view of Bell ('696). Ott et al. teaches a method of providing for a period of time, heated and humidified gas into a patient by directing a gas from a source to a chamber,

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humidifying the gas within the chamber with liquid, replenishing the liquid, heating the gas, filtering the gas, sensing the temperature, controlling the electrical power, wherein the step of heating and humidifying performed on the gas is simultaneous, with the chamber adjacent to the patient and that “It is known to filter insufflation gas” to prevent passing of inorganic molecules. He further states, “The location and type of filter, however, are very important factors which will influence the effectiveness of the method.” Ott et al. teaches all of the limitations of the claims except for explicitly reciting a humidity sensing means and a monitoring means connected to the humidity sensing means for monitoring the humidity of the gas and keeping it within a determined threshold. Bell teaches a humidity sensing means and a monitoring means for monitoring the humidity of the gas and keeping it within a determined threshold. It would have been obvious to one of ordinary skill in the art, at the time of invention to have modified the humidity device of Bartels et al. to monitor humidity by a humidity sensing means as taught by Bell while keeping the humidity within a determined range or threshold for the well known purpose of preventing a cavity that is normally moist from drying out thereby causing inflammation causing discomfort such as the respiratory system or otherwise. Please note that the Examiner considers a recharge signal as being any signal generated by the humidity sensor to indicate the device is low on humidity.

6. Claims 56-61 are rejected under 35 U.S.C. 103(a) as being unpatentable over Bartels et al. (U.S. 4,621,632) in view of Daniell et al. (6,050,260), and further in view of Rusz et al. Bartels et al. teaches a method of providing for a period of time, heated and humidified gas into a patient by directing a gas from a source to a chamber, humidifying the gas within the chamber with liquid, replenishing the liquid, heating the gas, filtering the gas, sensing the temperature,

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controlling the electrical power, wherein the step of heating and humidifying performed on the gas is simultaneous, with the chamber adjacent to the patient. Bartels teaches all of the limitations of the claims except for explicitly reciting a humidity sensing means and a monitoring means connected to the humidity sensing means for monitoring the humidity of the gas and keeping it within a determined threshold. Daniell et al. teaches a humidity sensing means and a monitoring means for monitoring the humidity of the gas and keeping it within a determined threshold. It would have been obvious to one of ordinary skill in the art, at the time of invention to have modified the humidity device of Bartels et al. to monitor humidity by a humidity sensing means while keeping the humidity within a determined range or threshold for the well known purpose of preventing a cavity that is normally moist from drying out thereby causing inflammation causing discomfort. Both Bartels et al. and Daniell et al. in combination teach all of the limitations of the claims except for explicitly reciting that a pharmacological agent may be added into the stream of gas. Rusz et al. teaches the addition of a pharmacological agent to a stream of gas. It would have been obvious to one of ordinary skill in the art, at the time of invention, to have modified the combination of Bartels et al. and Daniell et al. with the teachings of Rusz et al. to provide a respiratory device that is capable of delivering a pharmacological agent or anesthetic for the well known purpose of administering anesthesia during surgery.

#### ***Response to Arguments***

7. Applicant's arguments filed 02/18/2005 have been fully considered but they are not persuasive. In addressing Applicant's previous first argument of supported motivation, it is the Examiner's position that while there must be some teaching, reason, suggestion, or motivation that the references be combined to arrive at the claimed invention, there is no requirement that

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the references explicitly suggest the combination. *In re Nilssen*, 851 F.2d 1401, 1403, 7 USPQ2d 1500, 1502 (Fed. Cir. 1988). The suggestion or motivation to combine the references or teaching can derive solely from the existence of a teaching, which one of ordinary skill in the art would be presumed to know, and the use of that teaching to solve the same or similar problem which it addresses. *In re Wood*, 599 F.2d 1032, 1037, 202 USPQ 171, 174 (CCPA 1979). In response to applicant's argument that the examiner's conclusion of obviousness is based upon improper hindsight reasoning, it must be recognized that any judgment on obviousness is in a sense necessarily a reconstruction based upon hindsight reasoning. But so long as it takes into account only knowledge which was within the level of ordinary skill at the time the claimed invention was made, and does not include knowledge gleaned only from the applicant's disclosure, such a reconstruction is proper. See *In re McLaughlin*, 443 F.2d 1392, 170 USPQ 209 (CCPA 1971).

As to whether or not the combination teaches Applicant's claim 32, the limitations only recite, "sensing the humidity of the gas as it exits the chamber" and "detecting when the humidity of the gas in the chamber is below a predetermined humidity level." Never once does the claim recite that the sensing device must be contained within the chamber. In fact, this would potentially contradict the act of sensing the humidity of the gas as it exits the chamber, which implies that the sensing device may be distal the chamber. Therefore, it is submitted that the humidity sensing device of Bell in combination with Ott et al. meets the limitations of the claims. In addressing new claims 56-61 please note the rejection of record similar to case 09/363,234 for consistency.

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### Contacts

Any inquiry concerning this communication or earlier communications from the Examiner should be directed to Michael Thompson whose telephone number is (571) 272-4968. The Examiner can normally be reached on Monday through Friday from 9 am to 5 PM.

If attempts to reach the Examiner by telephone are unsuccessful, the Examiner's Supervisor, Nick Lucchesi, can be reached on (571) 272-4977. The official fax phone number for all submissions to the organization where this application or proceeding is assigned is (703) 872-9306.

Michael M. Thompson

Patent Examiner

  
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MT 

May 13, 2005